Supreme Court, U. S.
FILED
JAN 13 1979
MICHAEL RODAK, JR., CLERK

No. 78-780

In the Supreme Court of the United States

OCTOBER TERM, 1978

SCOTT ANDREW SHOVEA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-780

SCOTT ANDREW SHOVEA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the district court erred in refusing to strike the testimony of an agent of the Drug Enforcement Administration because the agent's original investigative notes had been destroyed in accordance with routine agency practice.

Following a jury trial in the United States District Court for the District of Colorado, petitioner was convicted, with a co-defendant, of manufacturing and possessing methamphetamine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1), and 18 U.S.C. 2, and of conspiring to commit those offenses, in violation of 21 U.S.C. 846.[1] He was sentenced to one year's imprison-

---

[1]Petitioner's co-defendant, Gebbie Hugh Robba, and a third defendant, Stephen Howard Gaias, Jr., have unsuccessfully sought review of their convictions in this Court. *Gaias and Robba* v. *United States*, cert. denied, No. 78-5293 (Nov. 27, 1978).

ment, of which six months was suspended. The court of appeals affirmed (Pet. App. 9-28).

The government's evidence is set forth in detail in the opinion of the court of appeals. In sum, the evidence showed that DEA agents in New York observed Stephen Gaias purchase several bottles of phenyl-2-propanone, a chemical used in the manufacture of methamphetamine (Pet. App. 10-11). The agents followed Gaias to Denver, where, over the next several days, they continued to observe Gaias and two other men, later determined to be petitioner and Gebbie Robba (Pet. App. 11). One evening the agents detected a strong odor of ether, which they knew was involved in the manufacture of methamphetamine, coming from the house where Robba resided. The agents saw petitioner Shovea leave the house, walk up and down the street looking in all directions, and go back inside (Pet. App. 12). Later, when the three men left the house carrying boxes and loaded them into a car, the agents arrested the men. The agents found concentrated liquid methamphetamine and articles used in its manufacture when they subsequently conducted a warrant-authorized search of the house and vehicles the defendants had been using (*ibid.*).

During his testimony at petitioner's trial, DEA Agent Richard Barter stated that his original investigative notes had been destroyed after they were turned over to Agent Robert Moren and incorporated into Moren's formal report (Pet. App. 22, 31-33). Petitioner moved to dismiss the indictment or to strike Barter's testimony because the original notes were unavailable.[2] Finding no evidence of any bad faith in the destruction of the notes or of substantial prejudice to petitioner, the court denied the motions (Pet. App. 34-35).

---

[2]Petitioner's counsel apparently was furnished with a copy of the formal report (see petitioner's brief in the court of appeals at 24).

The court of appeals properly rejected petitioner's claim that the destruction of Barter's notes violated the Jencks Act (18 U.S.C. 3500), or otherwise required striking his testimony. This Court has consistently declined to review similar claims,[3] and there is no reason for a different result here. It is true, as petitioner asserts, that the courts of appeals have taken divergent views on the producibility of rough interview notes of government agents (compare *United States* v. *Harris*, 543 F. 2d 1247 (9th Cir. 1976), and *United States* v. *Harrison*, 524 F. 2d 421 (D.C. Cir. 1975), with *United States* v. *Mase*, 556 F. 2d 671, 676 (2d Cir. 1977), cert. denied, 435 U.S. 916 (1978), *United States* v. *McCallie*, 554 F. 2d 770, 773 (6th Cir. 1977), and cases cited in *Harrison, supra*, 524 F. 2d at 430 n.25). In the instant case, however, the notes at issue were not taken during the course of an interview; they concerned only the investigative activities of the agent (Pet. App. 32, 34). Those cases that have required the preservation of rough notes have considered the question only with regard to notes that are taken contemporaneously with an interrogation. The rationale for requiring preservation of rough interview notes is that, because such notes are intended to reflect the statements of the accused or of a witness, any discrepancy between the notes and the official report of the statement may provide some benefit to a defendant. *United States* v. *Harrison*, *supra*, 524 F. 2d at 427-428, 432. Other types of investigative notes, on the other hand, are not necessarily recorded contemporaneously with the activities described and are not intended to record events of the investigation with the precision, detail, and fidelity appropriate to recording a witness's statement. There is thus no reason to believe that

---

[3]See, *e.g.*, *Stebbins* v. *United States*, cert. denied, 434 U.S. 938 (1977); *Harris* v. *United States*, cert. denied, 434 U.S. 986 (1977); *Mehta* v. *United States*, cert. denied, 434 U.S. 965 (1977); *Chew* v. *United States*, cert. denied, 430 U.S. 918 (1977).

the notes would be of any more aid to a defendant than the official report in which they are incorporated. See *United States* v. *Lane*, 574 F. 2d 1019, 1022 (10th Cir.), cert. denied, No. 78-323 (Oct. 2, 1978).

In this case petitioner was supplied with the formal report in which Agent Barter's notes had been incorporated, and he has failed to suggest that he was prejudiced in any way by his inability to obtain the notes in their rough form. Even those courts that have required preservation of rough interview notes have refused to reverse for failure to do so where no actual prejudice is shown. *United States* v. *Harris*, *supra*, 543 F. 2d at 1253; *United States* v. *Harrison*, *supra*, 524 F. 2d at 435. Moreover, the destruction of notes here was undertaken in good faith and in accordance with routine agency practice. We know of no case in which the good faith destruction of rough notes under such circumstances has led to the reversal of a conviction. See, *e.g.*, *United States* v. *Robinson*, 546 F. 2d 309, 312 (9th Cir. 1976), cert. denied, 430 U.S. 918 (1977).

It is therefore respectfully submitted that petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

JANUARY 1979

DOJ-1979-01